million subscribers combined, compared with 61.7 million subscribers served by cable operators.[8] Given the tremendous costs to launch a new network, profits are unlikely for new programming networks until 20 million to 30 million homes are served. Richard Mahler, *Struggling To Hook Up With New Viewers*, L.A. TIMES, Apr. 29, 1996 (quoting Lee Masters, MTV founder and now CEO of E! Network); Williams Aff.; Murvin Aff. National advertisers, such as Coke or Pepsi, will not consider purchasing advertising time on networks with viewership under 10 million subscribers, and some insist on penetration as high as 20 million homes. Williams Aff.; Murvin Aff.; Lee Aff.

Affiliated programming networks are no exception. Programming networks that are affiliated with cable operators are not automatically guaranteed adequate distribution, especially where the cable operator only owns a minority interest.

First, generally it takes far more than the number of subscribers reached by affiliated cable operator owners to break even, let alone make a profit. For example, the subscriber penetration of each of Commenters' cable investors is 10 to 12 million subscribers. Williams Aff.; Murvin Aff. Even if these cable operators agreed to distribute the networks on all of their respective cable systems, which they have not, the number of subscribers would fall far short of the number needed to generate a profit (20 to 30 million). Williams Aff.; Murvin Aff.

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[8] 1995 Competition Report, supra n.5, ¶ 215 ("the market for the distribution of video programming is not yet competitive"). According to the Commission's Second Annual Competition Report to Congress, as of September, 1995, DBS providers served 1.675 million subscribers, HSD providers served 2.34 million subscribers, MMDS providers served 800,000 subscribers, SMATV operators served 9,500 subscribers, and VDT operators served 9,350 subscribers. *Id.*

Second, cable programmers compete for systems at the local level—where demographics are the name of the game. Lee Aff.; Rogers Aff.; Murvin Aff. For example, Commenters' cable operator owners have not agreed to carry Commenters' programming on all of their systems. BET on Jazz, in which Tele-Communications, Inc. holds an indirect minority interest (26%), does not have a universal carriage agreement with TeleCommunications, and must prove to each cable system that the demographics of its subscribers are served by the network's programming. Lee Aff. To date, in fact, BET on Jazz is not carried on a single Tele-Communications, Inc. system! Lee Aff. Similarly, the largest affiliation agreement entered into by The Golf Channel, in which Comcast, Adelphia and Continental own minority interests, is not with one of its cable operator investors. Murvin Aff.

Third, the vertical integration restriction, 47 C.F.R. § 76.504, which requires cable operators to program at least 60 percent of their channels with unaffiliated programming, limits favoritism by cable operators for affiliated programmers. Many systems are presently carrying their quota of vertically integrated programming and can not add new programming networks in which they have invested.

B. New Programming Networks Are Already Struggling For Distribution At The Current Level Of Channel Availability On Cable Systems

The past few years have been marked by rapid increases in the number of programming networks competing for carriage on cable systems. A recent survey prepared by NCTA indicates that in 1995, 137 networks were vying for distribution, compared with 128 in 1994, and 101 in 1993. This marks a 36 percent increase in the number of networks in just two years. *See* NCTA CABLE BOOK, *supra* n.5, at 6, Exhibit 6. According to Commenters' exhaustive compilation of up-to-date statistics on programming networks. 226 programming networks have already launched to date, and 101 more are in the wings ready to launch. Exhibit 1.

Channel availability on cable systems already is too limited to fully accommodate the 300 plus programming networks in need of channel space. *See* Richard Mahler, *Struggling to Hook Up with Viewers*, L.A. TIMES, April 29, 1996 ("The dilemma for Century—and thousands of other cable operators across the country—is how to accommodate scores of wannabe networks on systems that are already overflowing."); COMM. DAILY Apr. 2, 1996, at 6 ("Main roadblock [to launch of C-SPAN 3] is lack of channel capacity on most cable systems . . . "); NEW NETWORK HANDBOOK at 3A ("Distribution remains a sticky point, and competition for cable space remains vicious . . ."); Richard Katz, *Despite Long Odds, Aspiring Nets Keep the Faith*, MULTICHANNEL NEWS, May 8, 1995, at 66 ("little channel capacity"); *Compression is Key—Number of New Cable Channels Continues to Grow, Despite Setbacks*, COMM. DAILY, Feb. 14, 1995, at 2 ("Tight channel capacity . . ."); *Let the Games Begin! Game Show Network Signs Advertisers, but Still Seeks Cable Subscribers*, CABLE WORLD, Dec. 12, 1994, at 52 ("the only problem is that no cable systems have signed up as yet due to a sparse capacity for channels."); Rich Brown, *New Networks Jockey for Channel Position*, BROADCASTING & CABLE, May 23, 1994 at 42 ("cable rate regulation, limited channel capacity and growing competition for ad dollars have changed the equation").

Other demands on channel capacity, such as federal must-carry and retransmission requirements and local PEG requirements, have already reduced the number of channels that are available to diverse programming networks. *See* 47 U.S.C. §§ 534, 531; Richard Zoglin, *Cable's Big Squeeze*, TIME 66, June 27, 1994. Networks that offer little in the way of diversity or originality, which cable systems were forced to carry in response to threats by affiliated broadcasting stations that threatened to charge for carriage, have consumed scarce cable channel space. *Id.* Lack of channel capacity is the number one reason offered by cable systems to new programming networks in denying carriage requests. Williams Aff.; Murvin Aff.; Lee Aff.; Richard Mahler, *Struggling To Hook Up With Viewers*, L.A. TIMES (April 29, 1996).

Largely due to rate regulation, increases in cable system capacity over the last several years have been modest, at best. The Commission's benchmark regulations, which reduced the amount that cable operators could charge per channel as channels increased, had the unintended effect of discouraging programming additions. The going forward rules encouraged cable operators to add networks such as shopping channels, that produced unregulated revenue streams. Finally, cable operators' decreased revenues and the uncertainty caused by rate regulations have caused many systems to abandon or postpone planned channel expansions. Since 1993, the total number of cable channels has increased by only 3.9%. hardly enough to accommodate a 36% increase in the number of programming networks. *See* Exhibit 6; Lee Aff.

Forecasts that digital compression would expand the channel space available to new programmers have been overly optimistic. Indeed, the development of digital compression technology is realistically at least several years away, and nationwide deployment of the technology may take more than a decade. Rich Brown, "History Has Cable Future: Survey Rates New Networks Most Likely To Be Added to System Line Ups," Broadcasting & Cable, Apr. 22, 1996, at 47 (citing survey results that estimate digital expansion within three to five years for approximately two-thirds of the responding systems). At least two major obstacles stand in the way of wide-spread deployment of digital compression technology: implementation of video encoding standards and the cost of digital set-top boxes and video encoders. 1995 Competition Report, *supra* n.5, at ¶¶ 189-0-; NEW NETWORK HANDBOOK, *supra* n.5 at 7A. So, despite the promise of digital compression, "most MSOs remain on the sidelines." Leslie Ellis, *Many MSOs are Wary of Digital*, MULTICHANNEL NEWS, Nov. 27, 1995, at 1.

This data shows what emerging programmers know all too well—more and more networks are competing for increasingly scarce cable system channel capacity, making it all the more difficult to survive in an industry where "distribution is still the name of the game" and "cable homes passed is the measure of success." NEW NETWORK HANDBOOK at 3A.

Many new programming networks have delayed launch, or even failed, because of limited channel availability. Jim McConville, *New Nets: Tough Act To Open; Cable Television Networks Launches Postponed*, CABLEVISION, Nov. 27, 1995 ("Reasons for delay include no available channel capacity, tight finance, uncertainty about pending deregulation, and pressure form MSOs to trade a piece of ownership for carriage space."). Forty-three networks are now scheduled to launch at a date later than originally slated, and twenty eight other networks have already failed altogether. Exhibit 1.

C. A Reduction In The Already Scarce Amount Of Channel Availability Will Cause Quality Programming Networks To Fail

Quality start-up programming networks cannot withstand a reduction in channel availability on cable systems. The existing level of channel capacity is the fundamental premise on which these networks were launched. Moreover, new programming networks' business plans include forecasts and projections based on increases, not decreases, in available channels.

If the channel capacity available to programming networks is reduced by CLA, the networks not only will be faced with a dramatic halt in future distribution agreements, but will inevitably be bumped from many systems on which they already have secured carriage. Cable systems are not going to drop channels like CNN, ESPN, HBO, Disney or Discovery, that cater to wider audiences and that have had sufficient time to develop loyal subscriber followings. Murvin Aff.; Williams Aff.; Lee Aff. Instead, cable systems have already indicated that the first channels that are likely to be dropped are new niche programming networks. *Id.*

D. The Proposed CLA Rules Have Serious Constitutional Implications

To the extent the Commission's proposed CLA rules subsidize CLA programmers and drastically reduce the channel capacity available for quality programming networks, the Commission's rules will violate these programmers' First Amendment rights. The express purpose of the proposed CLA rules is to "promote diversity and competition in programming sources." While these are permissible goals of government, *see Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2469 (1994), the means chosen to achieve them—requiring cable operators to favor certain programmers over others—fall far short of the constitutional requirement that even content-neutral restrictions on speech be *narrowly* tailored to achieve their intended purpose. The Commission's CLA proposals, which would profoundly restrict distribution of new niche programmers such as Commenters, as well as impinge on the programming choices of cable operators who otherwise would choose to carry Commenters' programming, run afoul of this standard.

The proposed CLA rules would also result in a Fifth Amendment Taking of Commenters', and other start-up networks', property. Laws that deprive a property owner of all or substantially all economically beneficial use of its property have consistently been held to be compensable regulatory takings. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The Commission's CLA rules, to the extent that they subsidize CLA programmers, *i.e.*, shopping channels and infomercials, will destroy the fundamental premise on which new, quality programming networks were launched—channel capacity. The cable television programming business is a highly competitive one, and failure to gain access to a sufficient number of subscribers — a minimum of 20 million for a national programmer — means the difference between survival and failure. The Commission's proposed rules will, if adopted, unquestionably cause the demise of a number of quality programming networks, including perhaps one or more of the Commenters, destroying their millions of dollars of investment in production studios and programming, and denying them all beneficial economic use of those assets. Nor was the Commission's drastic proposed change in policy predictable by Commenters or other new quality programmers. The CLA rules have been in place since 1984, and the Commission readdressed the issue in 1992. Nothing in the language of Section 612, its legislative history, the Commission's rules, or any action taken in the 12 years since Section 612's enactment—on which regulatory actions Commenters and other quality programmers relied in launching their new networks—forewarned them that the Commission might suddenly embark on a radical revision of its CLA rules. Should the Commission adopt its current CLA proposal, one or more new programming networks will be destroyed and the Commission will have violated such programmers' constitutionally protected property rights

Finally, the Commission's proposed CLA rate formula, or any similar formula that subsidizes CLA programmers at the expense of quality programming networks, also implicates the Fifth Amendment equal protection guaranty.[9] Where a federal law favors certain speakers over others, it will be considered unconstitutional if the distinction is not necessary to serve a compelling governmental interest. *See, e.g., FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984) (striking down editorializing restriction that does not substantially promote asserted interest); *News America Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988). In this case, the Commission's proposed CLA rate, which undeniably discriminates against new, start-up programmers such as Commenters in favor of home shopping and infomercial channels, is clearly not necessary to promote, and in fact is at odds with, Congress' goal of increased diversity and competition among quality programming networks.

VI. FULL-TIME PROGRAMMING OF ANY KIND SHOULD RECEIVE PRIORITY OVER PART-TIME PROGRAMMING

In its discussion in the NPRM of cable operators' obligation to open up new channels to accommodate requests for part-time CLA carriage, the Commission expressly recognized that "there may be circumstances in which greater harm to the subscribers, the operator and the non-leased access programmer may result if the leased access request is accommodated than would result for the leased access programmer if the leased access request is not accommodated." NPRM ¶ 124. In addition, the Commission tentatively concluded that a cable operator should not be required to open up an additional channel even if it is dark to accommodate part-time programming. The Commission proposed that a request for CLA channel space must be for a minimum of eight hours if it is to be given a preference over non-leased access, full-time

[9] The equal protection standards applicable to States under the Fourteenth Amendment are applied to the federal government under the Due Process Clause of the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497 (1954).

programming. But the Commission's proposal does not go far enough. In fact, full-time programming of any kind should always be given preference over part-time CLA programming, no matter what part-time period the CLA programmer proposes to occupy.

The economic reality is that quality commercial programming is full-time, 24-hour programming. National advertisers will not invest sufficiently in part-time programming networks to permit these networks to offer original, diverse, quality programming that subscribers have come to expect. Williams Aff. This is why part-time CLA is generally requested by infomercials and advertisers.

Clearly Congress did not intend for half-hour infomercials to displace full-time, quality, original programming. Indeed, it is highly improbable that Congress ever intended that infomercials would qualify as leased access "programming."[10] First, CLA was developed to "divorc[e] editorial control over a limited number of channels." 1984 House Report at 50. Unlike cable operators' overall channel capacity, which has always been limited, smaller time segments and advertising time have always been readily available on cable systems. The fact that such time is freely available is evidenced by the existence of companies such as Access Television Network, Guthey-Kenker, Inc. and PIN, companies created for the purpose of identifying "remnant" time on cable systems and selling such time to long-form advertisers.

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[10]Indeed, it is questionable whether Congress ever intended CLA to be part-time. In the 1984 House Report, Congress, in its instructions to cable systems on how to calculate carriage obligations, explained that fractional amounts should round-up to whole numbers. 1984 House Report at 48-49 (using example that 2.4 channels should be rounded up to 3 channels). If Congress had contemplated part-time carriage, it would not have been necessary to address the issue of fractional amounts.

Adam Snyder, INFONETS COMPETE FOR MORE THAN JUST SALES, MULTICHANNEL NEWS, Apr. 22, 1996, at 74.

Second, according to the canons of statutory construction, Congress' use of the term "video programming" in Section 612 should be construed according to the common usage of the word "video programming" in 1984. NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.28 (5th ed. 1992) at 248. In discussing what constitutes "video programming," and what therefore was from being provided by telephone companies under the 1984 Cable Act, the FCC stated: "Congress intended to prohibit only telephone company provision of programming comparable to that provided by broadcast television stations in 1984" *In re Telephone Company–Cable Television Cross-Ownership Rules*, Second Report and Order, 7 FCC Rcd. 5781, ¶ 74 (1994) ("Video Dialtone Order"); *accord, Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181, 193 (4th Cir. 1994) (*citing* Video Dialtone Order ¶ 74.) Then, as now, "programming" was generally considered to have entertainment and/or informational value apart from merely selling a product. *See, e.g., Policies and Rules Concerning Children's Television and Programming*, Report and Order, 6 FCC Rcd. 2111, 2112 (1991) (distinguishing advertising from programming for purposes of children's television).

The only court that has specifically addressed the issue of advertising on CLA has reached the same conclusion. In *Sofer v. United States*, No. 2:94cv1182, slip op. at 8 (E.D. Va. June 7, 1995), the court held that "the leased access provision of the Cable Act and related regulations . . . have no application to commercial advertising." The fact that *Sofer* concerned a more conventional 30-second advertisement does not diminish its precedential value. An advertisement does not qualify as programming simply because it exceeds the typical length that most advertisers can afford. In fact, at leased access rates, many advertisers could afford to run multiple hour-long commercials for less than the price of most 30-second television broadcast spots.

Thus, the Commission should not require cable systems to carry part-time CLA programmers in lieu of full-time quality programming networks.[11]

The Commission has also requested comments on whether proration of monthly CLA rates is appropriate for calculating part-time rates. NPRM ¶ 102. Under the implicit fee formula, proration resulted in part-time rates that were set well below market rates for advertising on cable systems. *See, e.g.*, oppositions filed in *Lorelei Communications v. Continental, Manchester, NH*, CSR 4564-L (filed July 27, 1995), and *Lorelei Communications v. Continental, Wilmington, MA*, CSR 4571-L (filed Aug. 9, 1995). The Commission should ensure that part-time programming is priced comparably to commercial advertising time on cable systems. Otherwise, part-time programmers will easily consume valuable channel space that could be occupied by quality, full-time programming.

VII. COMMENTERS PROPOSE TWO ALTERNATIVE APPROACHES THAT WOULD SATISFY CONGRESS' GOALS FOR CLA

In developing CLA, Congress sought to increase diversity and competition in programming sources in a manner that was consistent with the growth and development of cable systems. In the preceding paragraphs, Commenters have demonstrated why the Commission should not feel obligated to fill CLA set-asides. If, however, the Commission is determined to adopt a CLA rate formula that would subsidize CLA programmers, the following approaches

[11]By "full-time," Commenters do not mean one or two hours of infomercial programming that is repeated over the course of 24 hours.

would assist the Commission in minimizing the harm to new quality programming networks, in a manner consistent with the growth and development of cable systems.

A. One Possible Approach Is To Find That Conventional Programming Networks That Have Emerged Since The Commission's Initial CLA Rules Qualify For Leased Access Carriage

Nowhere in the text of Section 612 or its legislative history is CLA programming clearly defined. It is clear that a CLA programmer must be unaffiliated with the cable system on which it seeks to be carried. 47 U.S.C. § 532(b)(1). It is also clear that a CLA programmer may be a for-profit or not-for-profit entity. *Id.* § 532(b)(5). The legislative history accompanying the 1984 Cable Act suggests that CLA programming is programming that would not "have obtained access to the cable system without recourse to the provisions of [Section 612]." 1984 House Report at 55. Based on this limited information, it would appear that any programmer that cannot obtain access on a cable system because that cable system is presently channel-locked and is unaffiliated with the system may qualify as CLA programming for that system. The Commission should clarify that CLA programming includes quality programming networks that have emerged, i.e., launched since May 3, 1993, the date on which the Commission's original CLA rules were released, and that carriage of a qualifying network satisfies a cable operator's CLA obligation as to that particular channel.

Quality programmers have not sought carriage under CLA for various reasons, foremost of which is the fact that quality programmers cannot afford to pay for carriage and in fact expect to be paid for carriage. It is unclear under the current CLA rules whether cable systems may pay CLA programmers an affiliation fee.

1. Cable Operators Must Be Permitted To Use Their Discretion In Establishing Rates, Terms and Conditions Of Carriage

If subscribers are truly to benefit from diverse sources of programming, cable operators must be permitted to use their statutory discretion to price programming depending on whether it adds to the "marketing mix of existing services being offered by the cable operator to subscribers, as well as potential market fragmentation that might be created and any resulting impact that might have on subscribers or advertising revenues." 1984 House Report at 51. Thus, where programming will duplicate existing services and will not offer the cable operator a competitive advantage, the cable operator must be permitted to charge the maximum fee for carriage. In contrast, where programming is truly valuable to the cable system, the cable system should be able to pay the programmer for carriage, even if the programming is carried on a leased access channel. Nothing in Section 612 or its legislative history prohibits payments by cable systems to programmers. Indeed, in the legislative history accompanying the 1984 Cable Act, Congress expressly stated that "in using the term 'leased access,' the Committee does not intend only leasehold relationships between programmers and cable operators to be permissible." 1984 House Report at 48. This language strongly implies that Congress envisioned that some cable systems would not charge, or would in fact pay, some programmers for carriage.

2. A Preference For Non-Profit And LPTV Programming Is Not Supported In The Act.

The Commission entertains the possibility of mandating preferential rates for non-profit entities, and LPTV stations. NPRM ¶¶ 111-115. In proposing these preferences, the Commission is clearly exceeding its limited jurisdiction over CLA and is engaging in policy setting and social engineering, a role exclusively within the domain of Congress. *See supra* § II.

A preference for non-profit programmers is clearly contrary to the text of Section 612. Section 612(b)(5) defines "commercial use" as "the provision of video programming, *whether or not for profit*." 47 U.S.C. § 532(b)(5) (emphasis added). Nothing in the text of Section 612 or its legislative history suggests that non-profits should be given preferential treatment. Indeed, such a broad reaching preference is not likely to have the effect intended by the Commission. For example, various so-called "citizen militias" are non-profit entities. In addition, many non-profit corporations are huge entities, with annual incomes that dwarf most fledgling programming networks. For instance, the National Rifle Association of America, Inc. is the thirty-third largest non-profit in terms of annual income, with revenues for 1994 of $147,924,476.[12]

Congress created a preference for minority and educational programming in the 1992 amendments to Section 612. If Congress had intended to give other entities, such as non-profits or LPTV stations,[13] a preference, it would have done so. *Lukens Steel Co. v. Perkins*, 107 F.2d 627, 633 (D.C. Cir. 1939). Instead of preferences, Congress gave cable operators the right to negotiate lower rates for entities such as non-profits. This fact further implies that Congress did not intend for lower rates to be mandated by the Commission. "A statute which provides that a thing shall be done in a certain way carries with it an implied prohibition against doing that thing in any other way." NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION, § 47.23 (1996 Supp.) at 92.

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[12]D&B - Duns Market Identifiers, 1996, *available in* DIALOG, File No. 516.

[13]In fact, there is a strong argument that LPTV stations, a class already protected by the must-carry provisions, should not even be considered to qualify for CLA.

3. A First-Come, First-Served Approach and/or Highest Bidder Approach To Carriage Is Not Feasible

If the Commission clarifies that CLA was intended to include quality programming networks such as Commenters, then it cannot adopt a selection approach based solely on first-come, first-served. Chaos would erupt if the Commission at once clarified that some one hundred programmers qualify for leased access carriage and then ruled that they all must compete for four to nine channels per system on a first-come, first-served basis. This is not at all how programming decisions are made in the marketplace

To the extent the Commission dictates a selection process, its criteria should include such neutral business factors as: the desirability of the programming to subscribers and its effect on value of the cable system; the demographics of the system's subscribers; the programmers' financial backing; whether the programming is full-time. 24-hour programming or part-time; whether the programmer is willing to enter into a long term contract; and how much of the programming is original versus re-runs and library, or home-shopping or infomercial material. These are some of the neutral criteria that cable operators already use to make their decision of whether to carry a particular programming network.

B. Another Possible Approach Is To Adopt A Transition Period

The Commission suggests transitioning from the current implicit fee formula to a revised formula over a two- to three-year time period. NPRM ¶ 99. If the Commission proceeds with its proposed cost/market formula or a similar formula that artificially reduces leased access rates to spur demand, the Commission must consider the implications that such reduced CLA rates will have on start-up programming networks. The Commission should adopt a transition period that takes into account the investment of new programming networks not yet on cable systems. As the Commission has acknowledged in the context of its Notice of Proposed Rulemaking concerning Open Video Systems, CS Docket 96-46. FCC 96-99 (Mar. 11, 1996), interfering with conditions upon which business plans are made should be avoided. NPRM ¶ 25.

An adequate transition period should be linked to increases in available channel capacity on cable systems. In the Commission's Sixth Order on Reconsideration, 10 FCC Rcd. 1226 (1994) at Appendix C, 1316-1319, the Commission established a channel growth rate of approximately 3 channels per year, a level of growth upon which most programmers have, at least in part, based their business plans. The Commission could adopt a transition period linked to additions in channel capacity that exceed this amount. Or, the Commission could link the transition to a national roll-out of digital technology, which will greatly improve the availability of channel capacity on cable systems.

VIII. CONCLUSION

Congress' overriding purpose in creating the commercial leased access requirement was to promote diversity in program sources. In the twelve years since Section 612 was enacted, numerous diverse, quality programming networks have been created, substantially fulfilling that objective. Diversity has also been promoted through enhanced use of P.E.G. channels by persons wishing to present programming to the community

The Commission's current proposals threaten to undo much of the progress that has been made. The Commission cannot, and should not, be oblivious to the fact that the primary users and proponents of CLA, and those who have sought and would benefit from the current CLA proposals, are home shopping and infomercial programmers. Should the Commission adopt its proposed CLA revisions, many of the new, quality program networks that have emerged would be displaced from cable carriage by these shopping and sales channels. But how many shopping channels does the American public really need? And is it sound policy for the Commission to put at risk the diverse program networks, such as Commenters, whose growth Congress sought to encourage?

Commenters urge the Commission not to adopt its current CLA rate proposal, and to carefully examine the impact of any CLA rule revision it may consider on the ability of new programming networks, such as Commenters, to survive in the marketplace.

Respectfully submitted,

Burt A. Braverman
Maria T. Browne
Sandra Greiner
COLE, RAYWID & BRAVERMAN, L.L.P.
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006
(202) 659-9750
Attorneys for
Outdoor Life Network
Speedvision Network
The Golf Channel
BET on Jazz

May 15, 1996

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation Commercial Leased Access	MM Docket No. 92-266 CS Docket No. 96-60

AFFIDAVIT OF ROGER WILLIAMS

1. I, Roger Williams, am Executive Vice President and Chief Operating Officer of Outdoor Life Network ("Outdoor Life"), and Speedvision Network ("Speedvision"). In this capacity, I am familiar with all aspects of these networks' business operations, including their need for carriage on cable television systems and the impact that a reduction in cable systems' available channel capacity would have on the ability of these networks to remain economically viable.

2. The purpose of this affidavit is to provide information to the Federal Communications Commission ("Commission") in response to the Further Notice of Proposed Rulemaking ("NPRM") issued in the captioned matter concerning commercial leased access ("CLA").

3. Outdoor Life was launched on June 30, 1995, and is presently viewed by 3.1 million subscribers. Speedvision was launched on January 1, 1996, and is presently viewed by approximately one million subscribers. As recently launched start-up programming networks, with relatively low subscriber penetration, Outdoor Life and Speedvision will be severely

impacted by the revised commercial leased access regulations that have been proposed by the Commission.

4. It is my understanding that the Commission has proposed a rate formula in the NPRM that would eliminate the highest implicit fee formula for CLA channels and substitute in its place a formula based initially on costs and, after the CLA channel set-asides are full, on the marketplace value of the displaced channels. Under the Commission's proposed "cost/market" formula, the cost of leasing a channel under CLA would be negligible and carriage of CLA programmers effectively would be subsidized.[1] A formula that reduces rates below the market value will artificially spur demand for scarce channel space by home shopping and infomercial channels and others who do not need to charge fees for the distribution of their programming, and will destroy a principal premise on which Outdoor Life, Speedvision and other high quality, traditional program networks have been formed -- the availability of channel capacity on the nation's cable television systems for carriage of new, start-up networks.

5. Outdoor Life and Speedvision have already suffered setbacks as a result of federal regulation of cable systems. Must carry requirements initially caused a substantial decrease in the channel space on cable systems available to new, high quality programming networks. In addition, the Commission's benchmark regulations, which decreased the incremental amount that cable operators could charge per channel as channels increased, created a disincentive to cable systems to add additional programming channels. Rate re-regulation also reduced cable operators' revenues, causing many operators to add shopping and infomercial networks, which generated

[1] It is my understanding that the proposed CLA formula results in a negligible CLA rate, and in some cases even a negative rate that arguably could require a cable system to pay a CLA programmer.

unregulated revenues, in place of higher quality niche programming networks, such as Outdoor Life and Speedvision, whose rates and revenue generating potential were constrained by the rate regulations. Those rules, by restricting cable systems' revenue growth and even imposing rollbacks, also caused operators nationwide to forego planned system upgrades that would have expanded channel capacity and enabled systems to commence carriage of Outdoor Life and Speedvision. Now, the Commission's proposed revisions to the CLA rules threaten to deliver a final regulatory blow -- a blow from which Outdoor Life and Speedvision may not recover.

6. In this affidavit, I will address the following points:

a. the nature of the programming exhibited on Outdoor Life and Speedvision, and the decisions involved in targeting the niches served by these networks;

b. the investment necessary to launch and thereafter operate Outdoor Life and Speedvision, and why these networks must charge affiliates for carriage of their programming;

c. the fundamental importance of carriage by cable systems to the networks' ability to become commercially viable, and how extant, available channel capacity was a fundamental premise on which the networks' business plans were established; and

d. the potentially fatal impact on Outdoor Life and Speedvision that would be caused by adoption of the Commission's proposed revisions to its commercial leased access regulations and the resulting reduction in available cable system channel capacity.

The Nature of the Outdoor Life and Speedvision Networks

7. There currently are over three hundred programming networks competing for

carriage on cable systems in the United States. In order to attract and retain subscribers, niche programmers must target a segment of the population whose programming needs have not yet been adequately filled, and provide programming of the type, quantity and quality that their viewers desire. Niche programming such as this allows networks to provide in-depth coverage of subjects of special interest to their viewers.

8. Cable systems generally have been receptive to launching niche programming networks. While networks and cable operators may have differing interests on such economic matters as affiliation fees and marketing support, both are eager to provide programming to viewers that is distinct from other, existing program networks and that attracts and retains subscribers.

9. Outdoor Life is a 24 hour niche programming network that is devoted to outdoor recreation, conservation, wilderness and adventure. Its programming focuses on outdoor and environmental activities and interests, such as wildlife and wilderness conservation, fishing, mountaineering, hunting, camping, backpacking, mountain biking, white water sports and skiing. For example, "Nature Watch" is a family oriented program that explores various aspects of animal behavior. "Charlie West's Outdoor Gazette" brings viewers to some of the most spectacular locations in the world and features a wide variety of activities that can be enjoyed in nature, including hiking historic trails, kayacking remote rivers, and underwater treasure hunting. "Environmental Forum" is a weekly public affairs program produced in Washington, D.C. that examines environmental issues and has featured such prominent guests as Secretary of Interior Bruce Babbitt and a number of members of Congress. "Scouting USA", a monthly program produced in conjunction with the Boy Scouts of America, features the broad array of

scouting programs and activities. "Echo Forum" is a half hour weekly program produced in association with the Massachusetts Institute of Technology and the John F. Kennedy School of Government at Harvard University, which will examine the impact of business and industry on the environment. Currently, more than six hundred hours of Outdoor Life's programming lineup consists of original programs such as these, and the network's business plan calls for the amount of original programming to increase to three thousand hours within three years.

10. Speedvision is a 24 hour network offering never-before-viewed programming targeted to boating, aviation, and automobile/motorcycle enthusiasts. Speedvision presents magazine and lifestyle programs, historical documentaries, current news and information, and instructional how-to programs, which comprise eighty percent of its program lineup. The network also provides coverage of competition events, many of which are not covered by other networks, which comprise the remaining twenty percent of its programming. Speedvision's programs include "Planes of Fame," a historical series on the pilots and planes of today and days gone by; "Wild About Wheels," a 26-part series that explores the relationship between man and machine, industrial design and product success in the marketplace; "Sailor's Log," an 18-part series that teaches the basics of sailing; and "American Thunder," an expo on the American motorcycle lifestyle. In addition to these programs, Speedvision is committed to providing current news and information programming seven nights a week no later than the fourth quarter of 1997, so that its viewing audience will have the opportunity to receive news and information on a daily basis that is not exhibited elsewhere on any cable or broadcast television media. Speedvision's business plan calls for its program lineup to reach seventy percent of original programming by the end of its first year of operation.

11. The demographics of the viewing markets for Outdoor Life and Speedvision were studied thoroughly prior to launching these channels. It was determined that viewing needs in the networks' respective interest areas were underserved. For example, according to surveys conducted by Beta Research Corp., Outdoor Life was rated number one of 18 emerging networks, was the second most requested network among all adults ages 18 to 49, and was the third most requested among all non-subscribers ages 18 to 34. Consumer interest in the type of programming offered on Speedvision is evidenced by the over 250 vehicle-based magazine titles that are found on American newsstands, as well as the fact that there are more than 600,000 licensed private pilots, and more than 6,500,000 owners of motor and/or sailboats, in the U.S.

12. The Speedvision and Outdoor Life networks were created to fill the unserved, or underserved, needs and interests of their respective viewers. No other networks offer the breadth, depth or quality of coverage of these interests as do Outdoor Life and Speedvision.

Investment To Launch Quality Programming Network

13. Launching a quality programming network requires a tremendous financial investment. Under the Outdoor Life and Speedvision business plans, the networks will not break even financially until their fifth years of operation, respectively. By that time, the networks will have invested more than $180 million combined.

14. Original programming is far more costly to produce than re-runs and library material, or home-shopping and infomercial programming. Outdoor Life will spend in excess of $15 million in its first year of operation to produce and acquire original programming, and even more in successive years. Speedvision will spend in excess of $17 million on original programming in its first year and estimates that it will spend $20 million each year thereafter.

Each original one hour program produced on Outdoor Life averages $25,000-30,000, and some programs are substantially more expensive. For example, it costs $100,000 to produce each one hour special in Outdoor Life's "Adventure Quest" series. A typical three hour live event on Speedvision costs between $150,000 to $200,000 to produce.[2] While terribly expensive, Outdoor Life and Speedvision have determined that original, differentiated programming is the best way to serve the needs and interests of, and to attract and retain, their viewers.

15. Outdoor Life's and Speedvision's costs are further increased due to the networks' commitment to maximizing the quality of every aspect of their programming. For example, both networks feature programs that are filmed at distant locations around the world, which substantially increases their programming production and acquisition costs. Likewise, both networks have invested in state-of-the-art digital production facilities. These and other attributes account not only for the recognized excellence of the networks, but also for their substantial programming expenses, which will exceed $60 million by the end of the networks' second years of operation.

Distribution And Revenues Necessary For Commercial Viability

16. Conventional, quality 24 hour networks depend on a combination of affiliation fees and advertising revenues to attain commercial viability. Because of their very sizeable launch costs and continuing programming expenditures, Outdoor Life and Speedvision must charge cable operators monthly licensing fees for the right to distribute the networks' programming. Unlike a home shopping network or infomercial programmer whose programming and production costs

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[2]In addition to being very expensive to produce, live event programming has a limited "shelf life". Nonetheless, Speedvision makes this investment in order to serve its viewers.

are substantially less and that generates revenues from the sale of featured products, Outdoor Life and Speedvision could not possibly pay cable operators anything, or forego the right to charge cable operators licensing fees, for the right to distribute the networks' programming over cable systems.

17. Distribution is the key to attaining the revenues necessary to sustain the operation of the networks; and carriage on cable systems nationwide is the key to distribution. Outdoor Life and Speedvision must each reach 20 to 25 million subscribers before they will break even. Consequently, carriage by even all of the non-cable multichannel video providers still would not give the networks nearly the subscriber penetration they need to generate sufficient monthly licensing fees to become commercially viable. Cable systems are the still the primary distributor with the largest subscriber penetration and, thus, carriage by cable systems is central to Outdoor Life's and Speedvision's survival.

18. Distribution is pivotal in generating not only affiliate fees, but also advertising revenues, both of which are directly tied to subscriber penetration. Speedvision and Outdoor Life each need to attain significant advertising revenues to become commercially viable. Each network needs a penetration of at least twenty million full time subscribers to attract national advertisers such as soft drink companies, soap and detergent companies, automobile manufacturers, and gasoline, oil and tire companies. If distribution is artificially suppressed due to Commission regulations of the sort currently proposed, the networks will be unable to generate the level of advertising revenues necessary to sustain their operations.

19. Although the fact that Outdoor Life and Speedvision are substantially owned by several cable operators (Comcast, Cox and Continental) obviously will help in gaining subscriber